IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6486 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

BMC

Versus

PRAVIN H PANDYA

Appearance:

MR PRANAV G DESAI for Petitioner

Party in person Mr. Pravin H. Pandya for respondent

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 15/03/99

ORAL JUDGEMENT

Heard learned counsel for the petitioner as well as the respondent party in person. The present dispute is legacy of past disputes which have chequered history between the respondent and the petitioner. The respondent since the date of his first appointment with which continuity is claimed from 21.2.1976 has been claiming parity of his emoluments or wages with the clerk/tabulator whose duties he claims to have been

discharging. The Corporation has consistently denied him and has been pleading that the respondent has been discharging the duties of labour only. This led to discharge of respondent's service in the first instance on 1.9.1976 for which a reference was made to the Labour Court, Surat being Reference No. 248 of 1978. That order of termination was found to be invalid by award dated 16.12.1978. On publication of the award the respondent was reinstated on 24.4.1979. Thereafter, his services were again terminated and he was again discharged from services with effect from 1.1.1980. That discharge order was also made subject matter of another Industrial Dispute. The said termination was also found to be invalid by an award dated 7.5.1984 and the respondent was reinstated. In both the disputes the respondent has raised his claim to be reinstated on the post of clerk on termination being found to be illegal by contending that he was discharing the duties of cleark since his appointment until the dates of his respective termination. While holding termination to be illegal this question was not decided and the dispute whether the respondent workman was discharging the duties of labour and was only entitled to such wages or was discharging the duties of clerk/tabulator and was entitled to wages payable to clerk/tabulator continued to exist. In the first instance an application under Section 36A of the Industrial Disputes Act, 1947, was made. However, ultimately that was made subject matter of reference under Industrial Disputes Act in pursuance of the order of this court. The Labour Court in reference No. 84 of 1989, reference No. 606 of 1989 found the claim of the workman justified and directed that the Corporation absorbs the workman as clerk with effect from 1.1.1980. It also directed that the workman be paid as daily rated clerk/tabulator on 1.1.1976 to 31.12.1979 and with effect from 1.1.1980 to the date of reinstatement the workman be paid wages as a permanent clerk/tabulator as are given to other clerks in the department. This award of the Labour Court dated 30.12.1989 was carried to Supreme Court wherein the Corporation conceded to give respondent the status of clerk and emoluments of the post with effect from 6.2.1986. Accepting the concession, the award of the labour court giving respondent workman benefit of status and wages as of clerk, with effect from 1976 to 31.12.1979 as a daily rated clerk and thereafter permanent as clerk was set aside and it was substituted in terms of the concession. That order was made on 29.7.1991. Thus, the controversy as to the wages for the period from the date of initial appointment as clerk came to an end. However, the controversy again resurrected when the respondent retired on attaining the age of

superannuation on 28.2.1997. It is not in dispute that the respondent was entitled to gratuity under the Payment of Gratuity Act. However, for the computation of gratuity the services of the respondent were counted only with effect from 6.2.1989 the date of retirement i.e. the services prior to the date, with effect from which the respondent was to be treated as clerk and entitled to emoluments of the post of clerk, were not taken into consideration for counting the period of services rendered by the respondent workman by reasoning that as a result of the Supreme Court decision which denied the respondent backwages prior to 6.2.1989 forfeiting all his rights or claims arising from the services rendered prior to 6.2.1989. That was the plea which was taken before the controlling authority for payment of gratuity under the Gratuity Act who decided in favour of the respondent workman and the appellate authority also found the order of the controlling authority in order and confirmed the direction to pay the additional amount determined by the controlling authority (the difference between the amount of gratuity ought to have been computed and the amount of gratuity computed by the petitioner employer by treating the eligible services for computation of gratuity between 6.2.1989 to 28.2.1997 only). The additional amount has been deposited with the controlling authority but has not been paid to the respondent so far.

Two fold contentions are raised before this court. Firstly it has been contended that as a result of the Supreme Court decision the workman is not entitled to any arrears prior to 6.2.1989. His claim that he has worked as clerk prior to 6.2.1989 has not been accepted inasmuch as the award made by the Labour court to that effect has been set aside and therefore the said period cannot be counted for computation of the gratuity payable to the respondent.

The contention on its face is fallacious and cannot be accepted. From the narration of facts it is apparent that the respondent joined services on 21.2.1976 and the services were terminated on 1.9.1976 which was found to be a case of illegal termination of services by the award and in 1978 in pursuance of the order he was reinstated in April 1979. Again his services were terminated with effect from 1.1.1980 which was found to be invalid by the award dated 5.7.1987 in pursuance of which he has been reinstated. This also is not in dispute that in two cases the dispute between the parties as to the nature of duty discharged by the workman while in service was not decided notwithstanding the question about that being raised before it. Thus the continuance

of service since 21.2.1976 is beyond pale of doubt.

The dispute which was subject matter of award of the Industrial Tribunal dated 30.12.1989 was not in relation to termination of services or the continuation of service by the workman. It was proceedings on the premises that the workman was continuing in service, the dispute related only to the nature of duties performed by him so that his claim to high wages could be decided. The award was only for settling the dispute by giving daily rated wages as clerk/tabulator with effect from 1.7.1976 and thereafter from 1.1.1980 as a permanent clerk/tabulator i.e. to say with effect from 1.8.1986 by the said award the respondent workman became entitled to claim arrears of emoluments of clerk which were being paid to him. The petitioner got over this findings about actual nature of function by making a concession before the Hon'ble Supreme Court that it is prepared to treat the respondent workman as permanent clerk/tabulator with effect from 6.2.1989 the date when reference was made so as to end the controversy. This concession was accepted by the Supreme Court and the claim of the respondent workman to the emoluments of the post of clerk/tabulator was confined to with effect from 6.2.1989 as is apparent from the order of the Supreme Court which has been made part of the petition. These proceedings and the final order made by the Supreme Court nowhere impinges upon the question of period of continuity of the services whether in the capacity as a clerk or labour with the employer with effect from 21.2.1976.

The fact that notwithstanding orders were passed to terminate the services of the respondent workman by the Corporation, respondent continued in service with the Corporation since 21.2.1976 as a result of the two awards of labour court holding the termination to be invalid is not affected by the decision of the Supreme Court. It can further be assumed that his services upto 6.2.1989 could be treated in the capacity as contended by the Corporation and thereafter as a clerk as directed by the Supreme Court but in no event it could not be said that prior to 6.2.1989 the respondent workman was not in the employment of Corporation.

Payment of Gratuity Act provides that under Section 4 gratuity shall be payable to an employee onthee termination of his services after he has rendered continuous service for not less than five years. Sub-section (2) provides for every completed year of of service or part thereof in excess of six months the employer shall pay gratuity to an employee at the rate of

fifteen days' wages based on the rate of wages last drawn by the employee concerned. This provides that the employer shall pay gratuity to an employee at the rate of 15 days wages based on the wages last drawn by the employee concerned. The expression continued service which is to be counted for the purpose of computing gratuity and considering eligibility of a person for gratuity under Section 4 has been defined in Section 2A of the Act of 1972 which provides that the employee shall be in continuous service for a period if he has, for that purpose, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment) lay off, strike or a lock out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act. It is not the case of the petitioner that apart from two terminations referred to above, any order treating any period as absence of his service as a break in service has been passed in accordance with standing orders. Non-performance of duty during the period of which termination remained in force was not on account of any fault of the workman inasmuch as both the termination orders were found to be invalid and in both instances the respondent was reinstated. Thus, it cannot be said that there was any interruption within the meaning of Section 2A which could be treated as service with interruption or with break. It is in these circumstances the Labour Court held that the respondent workman on the facts about which there is no dispute as has been referred to above must be deemed in continuous services without break in employment of the petitioner Corporation with effect from 21.2.1976 until he retired on 28.3.1997. Therefore, merely on the basis of the aforesaid decision of the Supreme Court the respondent could not have been denied the computation of his gratuity by excluding the period prior to 6.2.1989 as not in service at all. It is not required for the purpose of considering any period for computation of gratuity that the employee must be in continuous service on the same post which he held at the time of retirement throughout.

Learned counsel next urged that the respondent workman has in fact not discharged the duties. This plea that was raised but has not been decided by the authorities. The plea is fallacious. My attention was invited to written statement filed on behalf of

Corporation. The plea had been raised about absence from the duty since 15.12.1979. It is to be recalled that it has been noticed by the appellate authority that as a result of reinstatement after termination of his services in 1976 the respondent workman resumed duty on 24.4.1979 and with effect from 1.1.1980 his services were again discharged. The appellate authority takes notice of number of days admitted to have been worked by the respondent workman during that period of reinstatement and retermination. Therefore, claim by the petitioner that he has not worked since 15.12.1979 until 1989 conveniently ignores the fact that from 1.1.1980 to 7.5.1984 the termination order was effective and there was no occasion for the respondent to actually discharge the duties. Plea of voluntarily leaving the duty since 15.12.1979 did not find favour to sustain the termination dated 1.1.1980. It was never the plea that in pursuance of the award the respondent did not resume duties. On the other hand it is apparent tfrom the proceedings out of which the Supreme Court judgement came to be made that a contest has taken place between the respondent and the Corporation about the actual nature of duties performed by him for resolving the issue as to what wages the workman is entitled to whether as a labour as contended by the petitioners, or as a clerk as contended by the workman. Had the workman not discharged his duties at all the question of comparison would not have arisen at all. The learned counsel has referred the entire material in this regard and has considered the question on the basis of the Supreme Court decision on which reliance is placed to exclude the period prior to 6.2.1989 and the same was not found acceptable.

In my opinion, no exception can be taken to the decision weighed by the controlling authority as well as appellate authority in holding that the petitioner is liable to pay gratuity by treating the respondent workman in continuous service within the meaning of Section 2A with effect from 21.2.1976 until the date of retirement. As a result this petition fails and is hereby dismissed with cost. Cost is quantified at Rs. 2500/-.

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